In the Supreme Court of the United States

No. 72-867

October Term, 1972

ROTEK, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit in its Cause Numbered 71-2073, entered on July 18, 1972.

OPINIONS BELOW

The order of the Sixth Circuit Court of Appeals in this cause is set forth in the Appendix to this petition, commencing at page A30, *infra;* it has not been officially reported.

The decision and order of the National Labor Relations Board is set forth in the Appendix to this petition, commencing at page A28, *infra*.

The decision, findings, conclusion and order of the Trial Examiner of the National Labor Relations Board is set forth in the Appendix to this petition commencing at page A1, *infra*.

JURISDICTION

The order sought to be reviewed was dated and entered on July 18, 1972. Petitioner filed a timely application for extension of time in which to file a petition for a writ of certiorari which was granted by Mr. Justice Stewart in an order dated October 10, 1972.

The United States Code, Title 28 § 1254(1) confers jurisdiction on this Court to review by Writ of Certiorari the order in question.

QUESTIONS PRESENTED

(1) Whether the Sixth Circuit Court of Appeals by adopting without comment or supporting reasons the inconsistent and illogical findings of the Trial Examiner has denied the Petitioner due process of law guaranteed it by United States Code, Title 29 § 160 (c, f)?

(2) Did not the Sixth Circuit Court of Appeals in this case issue an order in conflict with the decisions of other Courts of Appeals and sanction an application and interpretation of United States Code, Title 29 § 158 (a) (1, 3) which is not supported by the language of the statute or by the intent of the Congress?

STATUTORY PROVISIONS AND RULES INVOLVED

(1) The National Labor Relations Act, 29 United States Code, Section 158(a)(1, 3); hereinafter § 8(a)(1, 3):

"(a) It shall be unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

(2) The National Labor Relations Act, 29 United States Code, Section 160 (c, f); hereinafter § 10 (c, f):

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may

be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him; And provided further, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."

* * * * *

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit, wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

(3) Supreme Court Rules, Rule 19 (1) (b):

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has

not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

STATEMENT OF THE CASE

The petitioner (Rotek, Inc.) is a corporation engaged in the manufacture of bearings for the heavy equipment industry. Due to a devastating depression in the capital goods industry, which had a direct effect on Rotek's business as a supplier, President John Weber determined that a recession plan would be necessary if the company was to survive. The course of action chosen by Mr. Weber included a 35 percent reduction in expenses, abandonment of a research and development program on which $160,000.00 had already been spent and a 25 percent reduction in personnel, including both white and blue collar workers. This recession plan was implemented on August 12, 1970, following a complete reorganization of production personnel pursuant to Weber's attempt to retain only the most highly qualified, capable and industrious employees. This reorganization plan later became a focal point in the instant case, and therefore demands closer scrutiny.

Early in August of 1970 Mr. Weber convened a meeting of all department heads at which an organization chart was posted listing Rotek personnel by department and marking 27 individuals for termination as excess employees. Mr. Weber then said "Anyone who is listed in an excess category is available. As you walk around and talk to the other department heads, if you see a good man

there, you take him and you have some one put into your excess category" (R. 189).* No specific persons were earmarked for termination at this point and the supervisors spent sometime moving employees on and off the excess lists in an attempt to retain the most valuable ones. Efficiency and competency were the only criteria considered in making the decision as to whom should be terminated. Billy Fowler was one of the employees who moved into and out of the excess or termination category several times before the reorganization was complete, at which time he was in the former with 26 others.

On August 12, 1972, the twenty-seven employees were notified of their termination and informed that, although it was effective immediately, they would be paid until the end of the month. Of these affected employees, only six joined with Billy Fowler in the fourth and final amended charge, filed February 8, 1971. The National Labor Relations Board issued a formal complaint on that date against petitioner alleging that these seven employees had been discriminatorily discharged because of their union sympathies and desires in violation of § 8(a)(1, 3) and had been subjected to unlawful anti-union interrogation and pressure in violation of § 8(a)(1) while still employed at Rotek.

These charges came to be heard on May 25-26, 1971, before the Trial Examiner appointed by the NLRB and, of the numerous charges, only three were held to be valid. Of the three specific violations of the National Labor Relations Act found by the Trial Examiner, two concerned alleged unlawful interferences with employees' attempts to exercise their rights under the Act and the third dealt

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* "R." references are to the printed Appendix filed in the Court of Appeals, certified as the record herein.

with the alleged unlawful discharge of Billy Fowler in violation of § 8(a)(1, 3). In order to reach this conclusion the Trial Examiner was forced to completely disregard the evidence presented at the hearing as well as the clear meaning of the statute and judicial precedent in this and other Circuits. The NLRB affirmed this gross injustice as did the Sixth Circuit Court of Appeals, both without any comment, support, explanation or arguments in favor of their action.

A review of the record shows that all the charges contained in the original complaint stemmed from virtually identical facts but the Trial Examiner chose to draw illogical and inconsistent conclusions therefrom and to rule that Billy Fowler's case was different from that of the others and that he, and he alone, had been discriminatorily discharged. This special attention is not warranted by the facts or even by the Trial Examiner's findings and represents an attempt to pacify both sides in the dispute rather than an independent and impartial decision based upon the evidence presented.

REASONS FOR GRANTING THE WRIT

(1) This Court's powers of supervision should be exercised—the Sixth Circuit has sanctioned an application and interpretation of § 8(a)(1) which is directly in conflict with the decisions of other circuits.

The Trial Examiner ruled that Rotek was guilty of violating its employees' § 8(a)(1) rights on two separate occasions. In both instances the violations stemmed from discussions between supervisory and non-supervisory personnel, during which the latter allegedly were questioned concerning their union sympathies, general complaints, tool and equipment needs and suggestions for improving working conditions (pp. A4-A6, *infra*). The first alleged violation, that by Foreman Welling, concerned a threat to close Rotek's Ravenna plant and transfer operations to Irondale rather than allow a union to gain control. Not only was this unequivocally denied by Welling (R. 131-132) but it was impossible to do for reasons generally known among the employees (R. 177-130). In fact Irondale was an empty plant being prepared for the future production of large-size bearings not made in the Ravenna plant. Further, the Trial Examiner discredited the testimony of two of the three witnesses who claim to have heard the conversation as unreliable (p. A6, *infra*). Finally, other circuits have held that such expressions of anti-union sentiment on the part of a foreman are totally insufficient to support a cease and desist order unless the General Counsel can prove that the comments were attributable to or authorized by company personnel. *NLRB v. Mathieson Alkali Works*, 114 F.2d 796 (United States Court of Appeals, Fourth Circuit) (1940). The Fifth Circuit has also adopted this view by holding that isolated speeches or comments by low-level supervisors which are not

authorized, encouraged or even known to the management should not be imputed to the employer as a breach of this section. *NLRB v. Whittier Mills Co.*, 111 F.2d 474 (1940); *NLRB v. Hinde & Dauch Paper Co.*, 171 F.2d 240 (1948).

As the record is totally void of any proof that Rotek had knowledge of this violation, if indeed, it ever occurred, it is insufficient to support a claim of an § 8(a)(1) violation and in hopeless conflict with holdings in other circuits.

The second incident is equally incapable of supporting the allegation that it constituted an § 8(a)(1) violation. In spite of a history of regular plant-wide employee-management meetings held to solicit complaints, encourage management-employee dialogue and uncover grievances, which the Trial Examiner found were non-coercive and not violative of the Act (p. A8, *infra*), a meeting at the departmental level which not a single witness described as unusual, coercive or threatening (R. 48, 49) was held to violate § 8(a)(1). This finding is totally unwarranted by the evidence.

In both cases had the Sixth Circuit reviewed and followed the precedent in virtually any circuit the Trial Examiner's Decision would have been reversed. One of the outstanding cases in the area of § 8(a)(1) violations is *Bonnie Bourne dba Bourne Company v. NLRB*, 332 F.2d 47 (United States Court of Appeals, Second Circuit, 1964) in which the court stated that in similar circumstances a five-part test should be applied:

(1) *The background*, i.e., is there a history of employee hostility and discrimination.

(2) *The nature of the information sought*, e.g., did the interrogator appear to be seeking information

on which to base taking action against individual employees.

(3) *Identity of the questioner*, how high was he in the company hierarchy.

(4) *Place and method of interrogation*, e.g., was the employee called from work to the boss's office. Was there an atmosphere of unnatural formality.

(5) *Truthfulness of the reply.*

Applying these guidelines to this case, the record shows that: (1) there is no history of hostility or discrimination; (2) the information sought was completely innocuous; (3) the interrogators were the lowest-level supervisory employees; (4) the conversations took place at normal plant meetings and; (5) the replies were truthful and candid indicating no employee apprehension. There simply is no § 8(a)(1) violation indicated by these facts in light of the relevant case law.

The conflict between other decisions and the Sixth Circuit becomes apparent when some of the instances in which the courts have refused to find violations are mentioned. Inquiries, just prior to a union election, as to how an employee intended to vote was not a violation in *NLRB v. McCormick Steel Co.*, 381 F.2d 88 (C.A. 5, 1967). Deferring a normal annual wage increase until after the union representational election (*Louisiana Plastics v. NLRB*, 173 NLRB 20,436 (1968)) was not unlawful. Even the Sixth Circuit in an earlier decision, *NLRB v. Swan Cleaners*, 384 F.2d 609 (1967), held that questioning an employee about attendance at a union meeting was permissible. In short, the instant decision represents a radical departure from relevant precedent with no word of explanation. The order is completely contrary to both the evidence and the law and should be corrected.

(2) This Court's powers of supervision should be exercised—the Sixth Circuit has created a conflict in the decisions of the various circuits relating to management discretion and the manner of selecting employees for termination.

The recession plan adopted and implemented by Rotek, as more fully outlined hereinabove, resulted in the termination of twenty-seven employees. The Trial Examiner conceded that this reduction was in response to economic pressures (p. A14, *infra*) but stated that petitioner's total disregard of seniority rendered the plan suspect (pp. A20-A21, *infra*). It is worthy of note that this conclusion completely ignores the finding that five of the seven complaining employees had more seniority than did Billy Fowler, which deflates the argument that his case alone was exceptional for any reason.

In accepting the Trial Examiner's arguments, the Sixth Circuit completely disregarded the Fourth Circuit's holding in *NLRB v. Hackney & Sons* (426 F.2d 943 1970). That decision held that although seniority was the most common consideration in selecting employees for termination, it was not the only valid consideration which could be utilized. The standards used in *Hackney* were quite similar to those adopted by petitioner, and the conflict between the two circuits is quite obvious. *Hackney* stands for the proposition that management has some discretion in determining who it will retain and who will be terminated when the company is faced with a bleak economic future requiring reduction in the number of employees. The effect of any other decision would be to force every employer to layoff and fire employees on the basis of seniority alone, and this result is clearly not the intended purpose of the National Labor Relations Act. See also:

American Casting v. NLRB, 151 NLRB 172, 178 (1964) 365 F.2d 168 (1966), 7th Circuit.

The *Hackney* case is further applicable to the instant case since, in the former, the employer exerted a chilling influence on the employees' exercise of their right to organize in violation of § 8(a)(1), an allegation in this case. The Court nevertheless held that absent proof of discrimination with respect to the manner in which employees were selected for termination, a finding that the plan violated § 8(a)(3) could not be inferred from the § 8(a)(1) infraction. The inference which the Fourth Circuit would not permit in *Hackney* is the only basis on which the Rotek decision could have been based. It, too, cannot be permitted to stand.

(3) By enforcing the Trial Examiner's Decision, the Sixth Circuit has approved findings and conclusions which are so illogical, inconsistent and unsupported in light of the evidence, as to amount to a denial of petitioner's rights under § 10(c, f) of the Act.

The evidence presented at the hearing of this case was totally incapable of sustaining the subsequent finding that Rotek had violated any provisions of the National Labor Relations Act. Nevertheless, in spite of this clear absence of evidence of a violation, the Trial Examiner overruled this petitioner's motion to dismiss the complaint, which petitioner supported by reference to a 1967 decision by the Sixth Circuit, *Rivers Manufacturing Corporation v. NLRB*, 376 F.2d 511 (R. 118-119), a case which should have been controlling.

During the course of the hearing, the General Counsel failed to present any reliable evidence of the violations asserted and was unsuccessful in presenting a prima facie

case. Even more prejudicial to the petitioner were the actions by the Trial Examiner who, in his findings, repeatedly stated that a witness for the General Counsel had presented testimony which was unbelievable, unsupported, erroneous or uncreditable and then, a few paragraphs later, reversed his position and accepted integral portions of this same testimony to suport his decision.

It must be beyond dispute that the Act places the burden of proof on the General Counsel, who must prove his case by a preponderance of the evidence. *NLRB v. McGahaey*, 233 F.2d 406 (Fifth Circuit 1956); NLRA § 10(c). Rather than follow these rules, however, the Trial Examiner chose to ignore his own findings that the union had engaged in no organizational activity prior to August 10, 1970, and that there was no such activity between that date and August 12 when the discharges were made (p. A11, *infra*). He further overlooked his finding that the discharges were not unlawfully motivated (p. A14, *infra*) and ignored well-supported and obvious inferences that petitioner had no knowledge of union activity or unlawful purpose. In short, he inferred the violations from the testimony of discharged employees, which is clearly in violation of all applicable case law. *Portable Electric Tools, Inc. v. NLRB*, 309 F.2d 423 (7th Cir., 1962); *NLRB v. Fox Mfg. Co.*, 238 F.2d 211 (5th Cir., 1956); *NLRB v. McGahaey, supra.*

On appeal to the Sixth Circuit, this petitioner argued that, in light of *Rivers supra*, it was entitled to a review of the record and, if unsupported by substantial evidence, a reversal. Rotek received neither. There is no indication that *Rivers* was considered and, if it was, whether it has been abandoned as the law in this jurisdiction. A mere affirmance without comment in case where the bulk of the evidence is disputed and the Trial Examiner's find-

ings are attacked as inconsistent, illogical and unsupported by substantial evidence on the record as a whole does not comply with Rotek's undeniable right to review by the Board and the Sixth Circuit as provided in § 10(f) of the Act. In this case it amounts to a denial of due process of law.

CONCLUSION

This Court should issue the writ of certiorari prayed for and set aside the order here under review, not only to correct the injustice worked upon petitioner but also for the public good which would result from deciding the important questions presented, concerning the interpretation and application of the National Labor Relations Act.

Respectfully submitted,

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APPENDIX

APPENDIX

DECISION OF TRIAL EXAMINER

(Issued August 26, 1971)

Case No. 8-CA-5993

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD REGION 8

ROTEK INCORPORATED

and

BILLY FOWLER, an individual

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE.

GEORGE TURITZ, Trial Examiner: Upon charges filed by Billy Fowler ("Fowler") on August 17 and October 1, 1970, and January 27 and February 8, 1971, and respectively served on August 19, and October 1, 1970, and January 28, and February 8, 1971, respectively, upon Rotek, Incorporated ("Respondent" and, at times, "the Company"), the General Counsel of the National Labor Relations Board ("the Board"), through the Regional Director for Region 8, on February 8, 1971, issued a complaint and notice of hearing which was duly served upon Respondent. Respondent filed its answer in which it denied all allegations of unfair labor practices. A hearing on the Complaint was held before me at Akron, Ohio, on May 25 and

26, 1971, at which the General Counsel and Respondent were represented by their respective counsel. Both parties have submitted briefs.

Upon the entire record and from my observation of the witnesses, I make the following:

FINDINGS OF FACT.

I. The Business of Respondent.

Respondent, Rotek, Incorporated, is an Ohio corporation having its principal office and place of business in Ravenna, Ohio, where it is engaged in the manufacture, sale and distribution of bearings. In the course of its operations Respondent annually sells and ships from its plant in Ravenna directly to its customers located outside the State of Ohio products valued at in excess of $50,000. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the National Labor Relations Act, as amended ("the Act").

II. The Labor Organization Involved.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) ("the UAW") is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices.

The issues litigated at the hearing were: (a) whether various supervisors had coerced employees with respect to self-organization by threats, interrogation and promises of benefit; and (b) whether Respondent's discharge of six employees on August 12, 1970, and of one on August 19, in connection with a reduction in force, was violative of

the Act because the reduction was not in accordance with usual policy but was discriminatorily motivated, and/or because the selection of employees for discharge was discriminatory.

A. *Background.*

Respondent, which was organized in 1962 with about four employees, was engaged in the manufacture of bearings for use on excavators, cranes, Army tanks, turntables, and various other types of heavy equipment and machinery. It succeeded another company which in 1960 did a gross business of $100,000; Respondent's gross business in 1970 was $8,700,000. Throughout that period a substantial part of the necessary work was subcontracted.[1]

Prior to the events here in question Respondent had never had a layoff. It had a policy of having projects planned, "such as painting, fixing up," on which employees could work during slow periods. At a meeting of all the employees held in downtown Ravenna on May 25, 1970,[2] Weber told the employees that enough work was on hand to carry Respondent through the fall of 1970.[3] He also told the employees that he did not expect any layoffs,

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[1] Weber, Respondent's general manager and president, testified as to this, "I would guess about half." At least some of the subcontracted work could not be performed in Respondent's plant. Respondent also had a plant for the manufacture of bearings at Lorain, Ohio, and one in West Germany, neither of which is involved in this proceeding.

[2] Several witnesses for the General Counsel testified that the meeting took place in the middle of July, but since they so testified in response to the General Counsel's leading questions, I found their testimony as to the date unconvincing, and it has not been credited. On this point I have credited the testimony of Weber, who was corroborated by Mitchell, Respondent's plant superintendent.

[3] The General Counsel's witnesses testified that he said the fall of 1971, but I have credited Mitchell and Foreman Lloyd, who testified that the year mentioned was 1970.

but would cut hours instead.[4] On July 3, 1970, Mitchell, head of the factory department and plant superintendent, held a meeting of all the factory employees at which he stated that the slowdown in the economy would be affecting the Company and that the employees should therefore save their money and put it in the bank. He said that Respondent had never had a layoff, but there was always a possibility of one; and he also told the employees that a possible way of handling the expected slowdown was to go to 40 hours.

B. *Discussion of Unionization—Interrogation, Threats, Promises of Benefit.*

1. Fowler testified that in May 1970[5] his foreman, Welling, summoned him to his office, where, after commenting that he supposed that Fowler had "heard the talk that was going around the plant," he said, "We don't want a union"; that when Fowler replied that a union would benefit employees, especially as to wages, Welling said that he had worked in a plant where an attempt was made to organize a union, and he had been put out on the street. Fowler also testified that on that same occasion Welling asked him to submit a list of tools or anything else he needed to make his job easier. Welling admitted telling Fowler, as well as other employees, that on another job he had been put out on the street when an attempt had been made at organization, but he denied talking to Fowler

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[4] Weber, while testifying that he had no recollection of what he had said, stated that his thinking on the subject indicated to him that if he had said anything about cutting hours, it would have been a statement of a possible alternative, and not a promise. The testimony that Weber's statement was that he would cut hours rather than lay employees off was not otherwise denied, and it is significant that Superintendent Mitchell, who testified about that meeting did not touch on this point.

[5] Unless otherwise stated all dates hereafter mentioned in this Decision were in 1970

against unions or, in fact, saying anything at all to him about his attitude toward unions. As Fowler was an interested witness and was not corroborated, I find that the General Counsel has failed to prove by a preponderance of the evidence that Welling on this occasion made the comment about "the talk that was going around" or that he said, "We don't want a union." In view of this finding, there is insufficient evidence that Welling's inquiry, made in May, about Fowler's need for tools or anything else to make his job easier was violative of the Act. I shall recommend dismissal of paragraph 7A and 7B of the Complaint.

2. In the last week of June foreman Welling held a meeting in his office which was attended by William Pratt, Fowler, Rice, Waters, Burt, and White, then a leadman but later a foreman.[6] Rice and Fowler testified that Fowler did most of the talking; Pratt testified that both he and Fowler did. All three testified that Fowler said that wages should be raised and if that could not be accomplished within the shop, they would have to get help or support "from the outside." Pratt and Rice also testified that Welling replied that before a union was brought in Respondent would close the plant and move to Irondale.[7] White testified only that the meeting was about working conditions and whether the employees needed tools or had "gripes." I

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[6] Welling denied that such a meeting took place at that time, namely, on the same day as a meeting of his employees with Weber, president of Respondent. However, he was contradicted not only by General Counsel's witnesses, but also by White; and Superintendent Mitchell testified that the employees' foreman transmitted to him their request for the meeting with Weber. Welling impressed me unfavorably with respect to credibility.

[7] Respondent's Irondale plant, located 62 miles from Ravenna, was in the process of being prepared since early or middle 1970, but had no equipment installed prior to November 1970. It was ultimately to manufacture bearings up to 16 feet in diameter, as compared with a maximum of 9 feet at Ravenna, but it was also to produce smaller bearings. At the time of the hearing the Irondale plant had five employees, the same number as on the day of the reduction in force

found Rice's testimony about the meeting, which was corroborated by Fowler and Pratt, convincing[8] and I find that Fowler did most of the talking, that he threatened to resort to "help from the outside," meaning a union, if wages were not raised, and that Welling replied that if a union was brought in Respondent would close the plant and move to Irondale. I further find that Respondent thereby violated Section 8(a)(1) of the Act.

3. At the insistence of Welling's men a meeting with Weber, Respondent's president and general manager, was arranged for the same afternoon.[9] Fowler testified that between the two meetings Mitchell came to the assembly table where he and Pratt were working and, accusing Pratt of being "an instigator," warned him that he did not want to hear any more union talk. Pratt testified to a similar statement to him by Mitchell in the assembly area, but he did not connect it with Fowler or with the short period between the two meetings, placing the incident, pursuant to the General Counsel's leading, "around the first part of July." Significantly, he did testify that Mitchell had come to his assembly table between the two meetings, but only to tell him that the second meeting, the one with Weber, had been arranged. Pratt testified, further, that on other occasions Mitchell asked him if there was

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[8] On cross-examination Rice agreed with Respondent's counsel that all prior witnesses had been at the meeting. Both Rice and counsel were plainly mistaken; only two of the five prior witnesses, namely, Fowler and Waters, had been at the meeting. Waters did not testify about the incident at all. Fowler testified that Welling said that the purpose of the meeting was to ascertain gripes—"rights" in the transcript is an obvious error—of the employees, and that he expressed himself against unions. Fowler was preoccupied with his own prominence in the discussion, especially with respect to wages and resort to "help from the outside"; his recollection of the meeting as a whole was weak.

[9] At this meeting Fowler again did most of the talking. However, I find, contrary to Pratt's testimony, that on this occasion Fowler did not threaten to resort to "outside help" if wages were not raised.

any more talk about the union going on, and whether Pratt would back the union, which Pratt replied he would do. Mitchell denied substantially all this testimony. I have credited Mitchell and find that he did not make the various statements or ask the questions described in this paragraph. I shall recommend dismissal of paragraphs 6(A) and (B) of the Complaint.

4. Hards testified that about June 15, in the assembly and inspection area, he and Fowler were discussing "the union," and that Hutchinson, the chief inspector and foreman, who was beside them, told them that "union" was a nasty word round there and they should not talk about it. Fowler testified that about July 6 or shortly thereafter[10] at the inspection table in the assembly area, Hards commented, in Hutchinson's presence, that he was doing two men's work, whereupon Fowler said that if the men had a union they would put a stop to that and a lot of things. He further testified that Hutchinson said that "union" was not a good word round there. Hutchinson denied ever having made the comment. I find that the General Counsel has failed to prove that Hutchinson warned Hards or Fowler not to talk about the union, or threatened them with reprisals. I shall recommend the dismissal of paragraph 8 of the Complaint.

5. About July 1 James Lloyd, foreman of the shipping department, called a departmental meeting which was attended by five of his six employees. He commented, ". . . there is talk going around the shop about organizing the shop with a union," and he asked the men at the meeting if they were for or against having a union. John Suzelis replied, "As long as we are treated good, I have

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[10] Fowler fixed the occasion as at the time when he had just been transferred from assembly to the office. Respondent's records show that the transfer took place on July 6 and that on that day Hutchinson was on vacation.

no use for a union." Lloyd informed the employees that Mitchell has instructed him to hold the meeting in order to find out what, if any, complaints they had, and he explained that he wanted to know how Respondent could make improvements with respect to wages or anything else so that the employees would have no need for a union.

Mitchell held regular monthly meetings of all the factory employees to hear their complaints, so that the employees had no reason to read any coercive intent into Mitchell's action in continuing to hold his meetings in the face of the manifestation of interest in unionization. However, Lloyd's meeting was markedly different from Respondent's usual practice. There had been no practice of holding departmental meetings in his department. The mere fact that the institution of such more careful searching out of employee complaints coincided with their manifestation of interest in unionization went far to indicate to the employees that what Respondent was doing was improperly motivated and was intended to induce the employees not to unionize. Cf. *Raytheon Company,* 188 NLRB No. 42, separate opinion by Chairman Miller, concurring in part:

> But when the timing of either [solicitation of grievances or granting of improvements] is such as to coincide with the origination of employee union activity, then, absent affirmative showing of some legitimate business reason for the timing, it is not unreasonable to draw the inference of improper motivation and improper interference with employee freedom of choice.

However, Respondent did not rely on the mere timing to bring its message home to the employees; Lloyd stated in so many words that Respondent's purpose was to ascertain

what benefits to grant the employees "so that they wouldn't need to get a union in." It is true that nothing concrete was promised. However, that did not detract from the necessary tendency of the meeting to cause the employees to anticipate improved conditions of employment which might make union representation unnecessary. See *Reliance Electric Company, Madison Plant, Mechanical Driver Division,* 191 NLRB No. 1, where the Board stated, ". . . such cautious language, or even a refusal to commit Respondent to specific corrective action, does not cancel the employees' anticipation of improved conditions if the employees oppose or vote against the unions."

I find that by interrogating the employees concerning their union activities, sympathies, and desires, at the same time soliciting their complaints for the purpose of ascertaining what improvements in working conditions could be granted which would induce the employees not to seek unionization, Respondent violated Section 8(a)(1) of the Act. Cf. *Reliance Electric Company, etc., supra.*[11]

6. Fowler testified as follows: when he was interviewed by Dale Pratt, the supervisor on the office job he had applied for, to which he was transferred on July 6, Pratt told him that his application looked good and that he thought he could handle the job. At the same time he remarked that Fowler had a bad reference from a prior employer, which he named. Fowler asked Pratt why he would get a bad reference from that company, whereupon Pratt asked him whether he had been engaged in union activities. Fowler said he had been. Pratt denied Fowler's testimony. In the circumstances described by Fowler, Pratt's question referred solely to the prior employment

[11] The Complaint does not allege the solicitation of grievances or the implied promise of benefits as a separate violation.

and had no relevance, direct or indirect, express or implied, to employment with Respondent. I shall recommend dismissal of paragraph 10 of the Complaint.

7. Rice testified that in the middle of July his foreman, White, asked him while he was at work what he thought "about the Union," and whether he knew who was behind all the union talk; further, that he answered that he liked the union and would vote for it, and that while he knew who was behind the union talk, he could not tell White. White, who had been made foreman on July 1, testified that Rice once asked him if he had ever belonged to a union and that he had replied that he had on a previous job, but that otherwise he never spoke to Rice on that subject. More specifically, he denied asking Rice if he knew who was behind all the union talk, and denied that Rice told him he could not tell him. Rice was an interested witness and was not corroborated. I find that the General Counsel has failed to meet the burden of proving by a preponderance of the evidence that White interrogated Rice as the latter testified. I shall recommend dismissal of paragraph 11 of the Complaint.

8. Arbogast testified that on two occasions in early August, that is, about August 5, 6, or 7, his foreman on the night shift, Turner, asked him if he had heard any union talk, and that he replied no. On cross-examination he admitted that this was a lie. Turner denied Arbogast's testimony. Although Arbogast was an interested witness and was not corroborated, he testified especially convincingly, and I have credited his testimony. It is true that Respondent proved no legitimate purpose for Turner's questions. It is also true that interrogation about union activity has a tendency to cause employees to feel compelled to lie to their superiors[12] and thus demean them-

[12] Cf. *Bourne Co. v. N.L.R.B.*, 332 F.2d 47 (C.A. 2).

selves. However, those facts, standing alone, are not sufficient to make interrogation unlawful. The record is devoid of evidence of coercive conduct by Respondent sufficiently closely connected or related to the interrogation to make it unlawful. Cf. *Lakes Concrete Industries, Inc., et al.,* 172 NLRB No. 94. Nor does the record show Turner's questions to have been part of a systematic interrogation of employees, or that he questioned Arbogast during the sensitive, initial stages of an organizing campaign. Distinguish *Koch Engineering Company, Inc.,* 155 NLRB 1272, 1273. In view of the foregoing I shall recommend dismissal of paragraph 12 of the Complaint.

C. *Union Activity.*

On Saturday, August 8, after some weeks of discussion of unionizing among the employees, a UAW representative came to Hards' house to speak with him, Arbogast, Pratt, and Fowler. On August 10 Hards went to the UAW office in Cleveland, where he joined the organization and took some designation cards, for other employees. That same afternoon Fowler, Pratt, and Arbogast came to his house and signed cards. There is no evidence that any solicitation took place among other employees on August 10, 11, or 12, or that Respondent or any of its supervisors learned during that time of the employees' contact with the UAW. However, as indicated by findings already made, Respondent was aware that employees were actively considering unionization.

D. *The Layoff.*

On August 12 Respondent completed a large Government contract it had been working on for some time. At about 1 o'clock that day Respondent discharged 15 employees in the Ravenna manufacturing department, 9 hourly paid and 6 salaried. The selections were made by

Mitchell, the plant superintendent. Included were 6 of the 7 employees named in the Complaint; the seventh, Foster, who was the secretary of the corporate development manager, which was, apparently, part of general administration, was on vacation and was not notified of her discharge until August 19. Respondent cut employment back in other departments as follows: in engineering from 13 to 9; in field sales from 13 to 9;[13] in sales administration from 9 to 6; and in administration from 14 to 11. Those selections were made by Weber, the president, with the assistance of his secretary and Pierfelice, the controller. A new department, national accounts, was set up with 2 employees, so that the total number of individuals discharged was 27. They were paid to September 1. Respondent stopped a research program on a hydraulic motor on which it had expended $160,000 over 2 years, and it reduced its advertising budget from $130,000 to $54,000.

Foreman Lloyd told Suzelis and another discharged employee that the layoff was caused by a cutback in Government orders; foreman Dale Pratt told Fowler that he could not give any real explanation; foreman White told William Pratt that he did not know the reason; chief inspector Hutchinson told Hards that he had had no choice in the matter and did not know the reason; Pierfelice told Foster that Respondent had placed a plan for recession into effect. Those employees who asked about recall were strongly advised to seek other employment.

Following August 12 Respondent continued to keep employees working overtime and to subcontract work. During the period January through July 1970 the total amount of overtime worked in the Ravenna manufacturing department averaged about 3,000 hours per month; the average was substantially the same with August in-

[13] Two sales offices were closed down entirely.

cluded. For the period September 1970 through April 1971 the average was 2,069 hours per month; with August 1970 included it was 2,561 hours per month. During the period January through July 1970 subcontracting totaled approximately $842,000, for an average of about $120,000 per month; with August included the average was about $118,000. For the period September 1970 through April 1971 the total was approximately $673,000, for an average of about $84,000 per month; with August included the average was about $86,000. The General Counsel did not establish to what extent, if any, the subcontracted work could have, or had customarily, been performed in Respondent's plant.

Weber testified as follows: In 1969 business had been good, and he had anticipated that by the time the large Government order would have run out Respondent would have obtained new orders which would keep it busy. However, as completion of the contract approached, new orders fell off, and old orders were being canceled, in some cases even after shipment. Respondent came to the conclusion that it was facing an economic recession and decided that it would have to reduce expenses accordingly. In the latter part of July the various department heads other than manufacturing were instructed to prepare plans for reducing their personnel; and in early August, Mitchell, head of the Ravenna manufacturing department, was instructed to prepare plans for reducing his force by 25 percent. On Monday, August 10, Weber called a meeting of his staff and told them that his recession plan was to be placed into effect. He tacked on the wall a chart indicating the individuals whom Mitchell had selected for layoff from the manufacturing department and, with respect to the other departments, the individuals whom Weber, assisted by his secretary and Pierfelice, had selected for layoff; and he announced that any person so

listed as excess could be taken on by another department and some one else placed in the excess category.

Weber testified that he deliberately kept the pending layoff quiet and carried it out swiftly in order to avoid "personality discussions." He said that the reason he did not resort to assigning employees painting, clean-up, and similar work to tide them over as in the past was that this did not appear to be a temporary slow-down, but a long-term recession. Respondent's business, he said, was cyclical, and was sharply affected by economic conditions, and he testified that even when the time would come that Respondent got new orders, a long time—as much as 18 months—would be needed between a customer's initial interest and the actual filling of his order because it involved a large amount of preliminary work, including the construction and testing of prototypes.

Concluding findings as to the discriminatory discharges.

The decision to reduce the work force. While the General Counsel may have abandoned the contention—he does not urge it in his brief—at the hearing he attempted to establish that Respondent decided on the reduction in force for discriminatory, rather than business, reasons. Respondent's testimony that orders were substantially reduced prior to the layoff, and that it completed a large Government contract on August 12 was uncontradicted. Weber's testimony that those facts, together with the economics of the country and of Respondent's business caused Respondent to conclude that contraction was called for was corroborated by the uncontradicted evidence that Respondent also reduced its sales force and other parts of its organization not affected by any effort at unionization. It is true that the cutback, accompanied by continuation of overtime, represented a failure to live up to

Weber's statement or promise on May 25 that Respondent would cut hours before resorting to layoffs. However, the record does not show that Weber was aware in May that orders would fall off so sharply, nor does it show any experience in Respondent's history comparable with the situation it faced in August 1970. I find that the General Counsel failed to prove that Respondent decided to reduce its work force in order to discourage unionization or other collective activities.

There remains for consideration the question whether any of the employees named in the Complaint were selected for layoff for discriminatory reasons. Mitchell, head of the Manufacturing Department, where 6 of the 7 alleged discriminatees worked, testified that he selected the 15 employees discharged in his department on the basis of the comparative "ability, attitude, cooperation," of all his employees. However, except as to Hards, discussed below, neither Mitchell nor any other supervisor testified to any comparative appraisal of any of the discharged or retained employees.

Rice, an assembler, was hired not long before July 1, 1970.[14] He worked first under Welling, later under White. Bradfield, an assembler who started about July 16, was hired at a wage 10 cents per hour higher than Rice's, and White told Rice that Bradfield was worth it. However when Rice complained, he was granted a 10-cent increase, which brought his rate of pay up to Bradfield's. Rice engaged in some discussion of unions with White, but he did not sign a union card prior to his discharge. While there is no direct testimony about Bradfield's qualifications, Respondent's action in hiring him at a higher wage than Rice's is some slight indication that it had made a

[14] The General Counsel did not establish the date of his employment, but about July 1, Rice told Welling that he could not comment on working conditions because he had just been hired.

judgement at that time that he was a promising employee. Rice's collective or union activity was not outstanding. Therefore, even assuming that Mitchell did give a modicum of consideration to length of employment in making selections for layoff, Rice's seniority over Bradfield's was not substantial enough to warrant the conclusion that his selection was discriminatory. I find that the General Counsel has failed to adduce sufficient evidence proving that the discharge of Rice was discriminatory.

Suzelis worked for Respondent approximately 16 months. He was in the shipping department under Foreman Lloyd, and he received at least one wage increase in 1970. He engaged in no activity connected with unionization prior to his discharge other than to tell Lloyd at the meeting already described that "if we were treated right none of us wanted the union." The record does not show which employees, if any, in the shipping department or elsewhere were less useful or desirable than Suzelis. I find that the General Counsel has failed to prove that the discharge of Suzelis was discriminatory.

Foster was employed by Respondent for almost 16 months. She was secretary to Bradley Pritts, manager of corporate development. Almost from the beginning of her employment Pritts was aware that Foster's husband was an active union member at Babcock and Wilcox, and that she herself generally favored unions. Foster was a satisfactory employee, having received a merit increase in August.[15] The "recession plan" prepared by Mitchell called for one Kathy Beach to be transferred to work for Pritts and two other executives. Except for Weber's testimony to the effect that he, his secretary, and Pierfelice made the selections on the basis of relative merit, there is

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[15] Increases were granted by Respondent only on an individual basis, and virtually all employees who were retained received them.

no evidence as to the relative merit, relative seniority, or any other basis of comparison as between Foster and Beach or any other employees. I find that the General Counsel has failed to prove that the selection of Foster for discharge was discriminatory.

Hards, Arbogast, William Pratt, and Fowler were the four employees who met with the UAW representatives on August 8 at Hard's house and signed cards on August 10.[16] All were discharged on August 12.

Hards, employed 26 months, was the final inspector and in July, when Hutchinson was on vacation, he assumed the chief inspector's duties of finally approving bearings for shipment, assigning work to other inspectors, and ensuring that they kept themselves busy. When Hutchinson returned, he complimented Hards, as well as Elder, another inspector, for having taken good care of inspection during his absence. Hutchinson testified that Hards was not industrious, that he had to keep after him constantly to get his work done, and that he preferred Elder, who was very competent and could be relied on to carry out instructions. Elder had been employed about 1 year,[17] and Hards had helped Hutchinson break him in as an inspector. Fowler's testimony that Hards complained that he was doing two men's work tends to show that Hutchinson's idea of due industriousness was different from Hards'. Whether or not Hutchinson was reasonable in this respect, Fowler's testimony affords a degree of support for Hutchinson's claim that he considered Elder more industrious. This conclusion is not affected by the fact that Elder declined all opportunities to work Saturday overtime. There is nothing in the record

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[16] Fowler's card was not produced at the hearing. As already noted, there is no evidence that Respondent learned up to August 12 of the employees' contact with the UAW.

[17] Hards testified that Elder was hired 14 months after he was.

which indicates that Hutchinson thought that he would have refused to work on Saturdays if needed. Only one inspector was required, and up to August 12 Hards was always glad to be the man. Hards did no organizing at the plant. As to the gatherings at his house on August 8 and 10 and the signing of the UAW cards, the evidence indicates that the union representative and the four employee participants were the only ones who knew. Notwithstanding that all four found themselves discharged 2 days after they signed the cards, the record does not contain a basis for the inference that Respondent learned of the gatherings or the card signing. I find that the General Counsel has failed to prove that Hards' discharge was discriminatory.

Arbogast, employed 1 year, was the inspector on the night shift. His work was satisfactory and he was complimented by Mitchell. In July Turner, his foreman, overheard another employee[18] speak to Arbogast in favor of having a union; and Arbogast testified that in the course of his work he, himself, spoke to other employees, unnamed, in favor of having a union. About a week before his discharge Turner asked him twice whether he had heard any "union talk" and he answered that he had not. The General Counsel contends that Elder, the inspector who was retained, had less seniority than Arbogast. The record, however, does not show any substantial difference between the two men in this respect; as already noted, Elder was also employed about one year. Nor is there evidence in the record that Arbogast was a better employee than Elder. I find that the General Counsel has failed to prove by a preponderance of the evidence that Respondent's discharge of Arbogast was discriminatory.

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[18] The other employee, David McElroy, was also discharged on August 12, but he was not named in the Complaint.

William Pratt worked for Respondent almost 4½ years. He was an assembler and was complimented for his performance by Mitchell, the plant superintendent, and by Foremen Lloyd, Williams, Turner, Welling and White, and from time to time he was granted merit increases.[19] When discharged Pratt protested to Mitchell that Bradfield, an assembler hired about July 16, had been retained notwithstanding Pratt's substantial seniority. Mitchell replied that he felt that with time Bradfield would make a better assembler.

Pratt testified that he, as well as Fowler, did "most of the talking" at the meetings with Welling and Weber. However, except for Fowler's concession that at the Welling meeting "William Pratt spoke up" also, the other witnesses testified only to Fowler's outstanding participation at both meetings. As the General Counsel failed to establish that Pratt was outstanding in the employees' meetings with Welling and Weber, or that Respondent knew that Pratt had engaged in union activity or favored unionization, there is insufficient evidence to establish that Respondent's discharge of Pratt was violative of the Act.

Fowler, employed 7 months, was an assembler until July 6, when he was made production recorder in the scheduling department, an office job within the manufacturing department, which he was awarded pursuant to posting. The new job was of the same grade as assembler but it was salaried, the pay was somewhat higher, and it

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[19] Pratt's testimony as to the above facts was uncontradicted. In 1968, while he was in Respondent's employ, the Municipal Court of the county imposed on Pratt a sentence of 1 to 6 months. After serving 3 weeks Pratt was released on probation, conditioned upon his receiving psychiatric care and treatment. The release was procured with Respondent's active cooperation, and the psychiatric treatment was paid for in part by Respondent's insurer and in part directly by Respondent. Notwithstanding this Pratt bore some resentment against Mitchell who he thought could have obtained his release earlier.

was considered a promotion.[20] Hartline, the head of the scheduling department, told Fowler that he was doing a "real good job," and that it seemed that he would do well. At the time of the layoff Weber instructed the various department heads that anyone listed as excess could be picked up, irrespective of department, and another employee made excess, and Fowler went on and off the list several times before he was finally listed as excess. As Fowler had been promoted on July 6 and had gone "on and off the list" several times when the layoff list was being prepared, the inference is warranted that in his 7 months of employment, he had impressed Respondent as a desirable employee, and I so find. Weber's instruction that employees listed as excess could be picked up and others substituted plainly placed Fowler in competition with Bradfield for the assembler job from which Fowler had recently been transferred.

Fowler was outstanding among the employees in the meetings with Weber and Welling, and it was he who said that the employees would resort to a union for help to raise wages. It was that statement which brought on Respondent's threat, through Welling, to close the plant and move to Irondale. Respondent contends that it "had no knowledge of any specific union organizational activity." However, Respondent was fully aware that the employees were considering unionization, which Respondent opposed, and Mitchell took the step of having at least Foreman Lloyd call a meeting of his employees to ascertain what improvements could be instituted to persuade the employees not to unionize, irrespective of the identity of the union.

Even where seniority is not formally or explicitly recognized as a factor for retention of employees, it does

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[20] In its brief Respondent refers to the transfer as a promotion.

not comport with ordinary business practice for an employer completely to disregard substantial differences in length of service when compelled to discharge employees for business reasons. Since Respondent was hostile to unionization and even took steps to find out what benefits to grant which would persuade the employees not to unionize, and it retained Bradfield, a recent employee, in preference to Fowler, whose 7 months of employment had resulted in his being considered a desirable employee but who had been outstanding in the employees' collective activity, a *prima facie* case of discriminatory selection was established. See *N.L.R.B. v. American Casting Service, Inc.*, 365 F.2d 168, enfg. 151 NLRB 172, 177; *N.L.R.B. v. Deena Products Co.*, 195 F.2d 330, 335, enfg. 93 NLRB 549.

Mitchell's bare, general testimony that he had selected the 15 employees for discharge on the basis of "ability, attitude, cooperation," even in conjunction with the fact that Bradfield had been hired at a rate 10 cents per hour above that of another recent employee, Rice, was not sufficient to meet this *prima facie* case. Nor is it met by the fact that Respondent promoted Fowler, and that it seriously considered retaining him notwithstanding the outspokenness he had displayed to Respondent in advocating unionization. This is not a case where no employee would have been discharged but for Respondent's desire to discourage unionization. A reduction in force was decided on for business reasons, and the only question at issue is whether Respondent's selection of the dischargee was based on the fact that Fowler had been prominent and outspoken in advocating higher wages for all the employees and unionization. In view of the absence of testimony explaining why Respondent considered Bradfield superior to Fowler, I am persuaded by the evidence on the record as a whole that Respondent selected Fowler for discharge because he engaged in concerted activities and ad-

vocated unionization. I am also persuaded that Respondent discharged him in order to discourage membership in any labor organization. I find that Respondent thereby violated Section 8(a)(1) and (3) of the Act.

IV. The Effect of the Unfair Labor Practice Upon Commerce.

I find that the activities of Respondent set forth above in section III, occurring in connection with its operations described in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

In order to effectuate the policies of the Act, I find that it is necessary that Respondent be ordered to cease and desist from the unfair labor practices found and from like or related invasions of the employees' Section 7 rights, and to take certain affirmative action.

I recommend that Respondent reinstate Billy Fowler to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and that he be made whole for any loss of earnings suffered by reason of the discrimination against him. The amount of backpay shall be a sum of money equal to the amount that he normally would have earned as wages from the date of the discrimination against him to the date of his reinstatement or offer of reinstatement, less his net earnings during said period, such backpay to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289, 291-294; and it shall include interest at the rate of 6 percent per annum, to be computed

in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716. Respondent shall preserve and make available to the Board and its agents for examination and copying all payroll, production, subcontracting, and other records necessary for the computation of backpay.

Upon the basis of the foregoing findings of fact and on the entire record in this case, I make the following:

CONCLUSIONS OF LAW.

1. Respondent, Rotek, Incorporated, is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is, and at all times material has been, an employer within the meaning of Section 2(2) of the Act.

3. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) is a labor organization within the meaning of Section 2(5) of the Act.

4. By discriminatorily discharging Billy Fowler Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. The unfair labor practices described above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[21]

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[21] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Rela-

(*Continued on following page*)

ORDER

Respondent, Rotek, Incorporated, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Laying off, discharging, or otherwise discriminating against employees with respect to hire or tenure of employment or terms or conditions of employment, because they engage in concerted activities or in order to discourage membership in labor organizations.

(b) Threatening to close its plant or to move its business to a new location if the employees permit themselves to be organized by a union or if they designate a union as their representative for collective bargaining.

(c) Interrogating employees concerning their union sympathies or desires in such manner, or under such circumstances, as to constitute a violation of Section 8(a)(1) of the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which, it is found, will effectuate the policies of the Act:

(a) Offer Billy Fowler immediate and full reinstatement to his former job, or if that job no longer exists, to a

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Footnote continued—
tions Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, automatically become the findings, conclusions, decision, and Order of the Board, and all objections thereto shall be deemed waived for all purposes.

substantially equivalent position, without prejudice to his seniority and other rights and privileges.

(b) Make Billy Fowler whole for any loss of earnings which he may have suffered as a result of the discrimination against him with interest at 6 percent, in the manner described in section V of this Decision entitled "The Remedy."

(c) Preserve, and, upon request, make available to the Board and its agents for examination and copying, all payroll, production, and subcontracting records, and all other data necessary to analyze and compute the backpay required by this order.

(d) Notify Billy Fowler, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(e) Post in its office and plant at Ravenna, Ohio, copies of the notice attached hereto marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 8 shall, after being signed by a representative of Respondent, be posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

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[22] In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(f) Notify said Regional Director for Region 8, in writing, within 20 days from the date of the receipt of this Decision, what steps Respondent has taken to comply herewith.[23]

It is further recommended that the Complaint be dismissed insofar as it alleges unfair labor practices not specifically found in this Decision.

Dated at Washington, D. C. Aug. 26, 1971.

GEORGE TURITZ,
Trial Examiner.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL offer Billy Fowler immediate and full reinstatement to his former job, without prejudice to his seniority and other rights and privileges. If he is in the Armed Forces, we will notify him of his right to have his former job back after discharge from the Armed Forces.

WE WILL pay Billy Fowler for any loss of wages he suffered as a result of the discrimination which it has been found we practiced against him.

WE WILL NOT lay off or discharge employees or discriminate against them in any other manner because of their concerted activities or in order to discourage membership in any labor organization.

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[23] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify said Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith."

WE WILL NOT threaten to close our plant or move our operations to another location if our employees decide to bargain collectively or allow themselves to be organized by a union.

WE WILL NOT question you about your union sympathies or desires under such circumstances or in such a manner as to constitute coercion.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of your own choosing, or to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except insofar as these rights might be affected by a contract with a labor organization, if validly made in accordance with the National Labor Relations Act, whereby membership in a labor organization is a condition of employment on or after the 30th day following the date of the contract or the beginning of such employment, whichever is later.

ROTEK INCORPORATED
(Employer)

Dated ..... By .....
(Representative) (Title)

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DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Issued December 7, 1971)

Case No. 8-CA-5993

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD REGION 8

ROTEK INCORPORATED

and

BILLY FOWLER, an individual

DECISION AND ORDER

On August 26, 1971, Trial Examiner George Turitz issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs, and Respondent filed a brief in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings,

findings,[1] and conclusions and to adopt his recommended Order.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the Respondent, Rotek, Incorporated, Ravenna, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order.

Dated, Washington, D.C. Dec. 7, 1971.

EDWARD B. MILLER, *Chairman,*

JOHN H. FANNING, *Member,*

RALPH E. KENNEDY, *Member,*

National Labor Relations Board.

(Seal)

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[1] In holding that the General Counsel had not sustained his burden of proof with respect to certain allegations of violations of Section 8(a)(1) of the Act, the Trial Examiner relied solely on the fact that the employees who testified concerning the incidents in question were "interested witnesses." In our view, this factor, standing alone, does not necessarily require rejection of a witness' testimony. However, we find it unnecessary to pass on these 8(a)(1) allegations, since additional findings of unlawful interrogation would merely be cumulative and, therefore, would not affect our remedy herein

ORDER OF THE COURT OF APPEALS

(Filed July 18, 1972)

No. 71-2073

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROTEK, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ORDER

Before: EDWARDS, PECK and KENT, *Circuit Judges.*

This cause came on to be heard upon the record on appeal and the briefs and arguments of counsel, and upon due consideration thereof and of the factual situation as set out in the record and the report of the case, 194 N.L.R.B. No. 73, it appears to the Court that the findings and order of the Board are supported by substantial evidence on the record as a whole.

Now, therefore, IT IS ORDERED, that the order of the Board be and it is hereby enforced.

ENTERED BY ORDER OF THE COURT

/s/ JAMES A. HIGGINS
Clerk

OPINION OF THE COURT OF APPEALS IN THE CASE OF RIVERS MFG. CORP., 376 F.2d 511

(May 9, 1967)

No. 16,825

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

RIVERS MANUFACTURING CORP.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for review of, and counter-request for enforcement of, a decision of the National Labor Relations Board finding employer guilty of unfair labor practices. The Court of Appeals, O'Sullivan, Circuit Judge, held that evidence did not support finding that employer discharged employees to discourage union membership, in view of failure to show that employer knew of union activities at time of discharge.

Order vacated and denied enforcement in part, and in other respects enforced.

1. Labor Relations

Evidence did not support finding that employer discharged employees to discourage union membership, in view of failure to show that employer knew of union activities at time of discharge. National Labor Relations Act, §§ 8(a) (1, 3), 10(e, f) as amended 29 U.S.C.A. §§ 158(a) (1, 3), 160(e, f).

2. Labor Relations

Reviewing court must inquire whether there is substantial evidence to support conclusion reached by examiner and affirmed by National Labor Relations Board, even assuming that all testimony relied on by examiner was true.

3. Labor Relations

Examiner's view that employer's assigned reasons for discharges were neither valid nor credible would not provide the needed evidence of discriminatory motivation in such discharges. National Labor Relations Act, §§ 8(a) (1, 3), 10 (e, f) as amended 29 U.S.C.A. §§ 158(a) (1, 3), 160(e, f).

4. Labor Relations

General counsel had burden to prove allegations of complaint and demonstrate that employer's action was motivated, at least in part, by antiunion bias. National Labor Relations Act, §§ 8(a), (1, 3), 10(e, f) as amended 29 U.S.C.A. §§ 158 (a) (1, 3), 160(e, f).

Robert H. Cowan, Nashville, Tenn. (Gracey, Buck, Maddin & Cowan, Nashville, Tenn., on the brief), for petitioner.

Morton Namrow, National Labor Relations Board, Washington, D. C. (Arnold Ordman, Gen. Counsel, Dominick L. Manoli, Associate Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, Allison W. Brown, Jr., Atty., National Labor Relations Board, Washington, D. C., on the brief), for respondent.

Before O'SULLIVAN, CELEBREZZE and McCREE, Circuit Judges.

O'SULLIVAN, Circuit Judge.

This matter involves a petition for review, and a counter request for enforcement, of a decision of the National Labor Relations Board (reported at 154 NLRB No. 51) finding Rivers Manufacturing Corporation guilty of 8(a) (1) and 8(a) (3) unfair labor practices, 29 U.S.C.A. § 158 (a) (1) and (3). The alleged violations related to the discharge of nine employees of Rivers and the interrogation, coercion and illegal persuasion of others—activity meant to discourage union membership. The context of these events was a short-lived and unsuccessful effort of the International Union of Mine, Mill and Smelter Workers (AFL-CIO), to organize the approximately 100 employees of Rivers Manufacturing Corporation of Centerville, Tennessee. We deal only with the discharge of five employees on October 2, 1964, and not with alleged other employer misconduct on and after November 15, 1964, including the seriatim firing of four workers late in November and early in December of that year.

[1] We so limit our review because petitioner's brief, with becoming candor and good advocacy, states that,

> "It [Rivers Mfg. Corp.] will concede at the outset that reasonable minds might differ on the conclusions based on the record as a whole reached by Respondent for any actions taken by Petitioner after, on or about November 15, 1964, however Petitioner firmly contends that these, perhaps zealous, actions should not be used to condemn its valid terminations on October 2, 1964."

The question, thus, for our decision is whether the Board's finding that Rivers on October 2, 1964, discharged employees Sanders, Haley, Mayberry, Brown and Shelton to discourage membership in a union, was supported "by substantial evidence on the record considered as a whole." § 10(e) and (f) of the Act, 29 U.S.C.A. § 160(e) and (f).

We hold that such finding was not so supported, and that the company is not required to reinstate the five dischargees and pay them for any loss of wages they have suffered.

Rivers manufactures plastic and neon signs fashioned from plastic, aluminum, stainless steel, paint and other component materials. Its plant, which employs about 100 people, is at Centerville, Tennessee; R. T. Rivers is its president and principal owner. There is no evidence that prior to November, 1964, the company had any collisions with any union or had ever exhibited an anti-union disposition. The company's explanation of the events leading to the discharges here in issue is as follows:

In the first half of 1964 the company had sustained serious losses and at various meetings of its directors in the summer and early fall of that year, the fact that the company's "finances were in a most critical situation" was discussed. In late September it was decided that the working force would have to be reduced and inefficient workmen replaced. In furtherance of this purpose, a review of the production payroll was made by supervisory personnel, using a list which set out the names of some 86 people, ranked according to their seniority. This list, containing notations thereon as to the skills and usefulness of various employees was completed just prior to the October 2 discharges. It was received in evidence and its authenticity is not questioned. The names of the five alleged discriminatees were crossed out, as were others, indicative of an intention to lay them off. In the instance of three of the discriminatees, notations were made as to the poor quality of their work. Four of these five had started work in July or August, 1964, and were generally among the most recently hired employees. They were dismissed on October 2, and while no exact figure as to the number of em-

ployees laid off at that time was given—one witness said 8 or 10—there are some 14 names stricken from the list. There is no evidence as to whether any of the October 2 dischargees, other than the five here involved, were or were not union adherents. The trial examiner foreclosed inquiry as to this point.

There is no evidence that on or prior to October 2 the Rivers company had knowledge of any union activity in its plant. The Board's inference to the contrary is, in our view, without evidentiary support. There was evidence, however, that commencing on or about November 15 the company became aware of activity by the Mine, Mill and Smelter's union to sign up some of its employees. From this evidence and under the company's concession, we may accept the Board's findings that the company thereafter resisted the union's campaign and by virtue of its interrogation, surveillance and pressuring of various employees, coupled with the firing of some four workers in late November and December of 1964, was guilty of the unfair labor practices charged, relating to such conduct. The union organization activities apparently ended when, either due to voluntary cooperation or coercive inducement, those who had signed up for the union withdrew therefrom.

But, although we affirm the Board as to part of its findings, we cannot let stand the examiner's inference that the company had knowledge of the union's campaign when it discharged the five employees on October 2, and that the discharges, consequently, were made to discourage membership in the union. The total evidence from which this inference was drawn is as follows:

1) The five alleged discriminatees testified that they had on September 23 or 24 signed cards to join the union, and one or more said that they had asked others to sign.

None claimed to have disclosed this in any way to any supervisory personnel.

2) One of the alleged discriminatees, William Mayberry, was employed by the company on August 7, 1964. He had previously been employed by a company called Tennco and had there been a member of Stove Mounters Union, Local No. 153. He testified that when he came to Rivers he had a bumper sticker on his automobile evidencing his membership in that union; that he had several of these stickers in his automobile and that some other employees took and displayed them on their bumpers. He was unaware of how many did this, saying "I don't know anyone in particular. I just saw them on the cards [sic] there. There were a green Chevrolet it was on." Mayberry further said that he carried a "union handbook, wage scales and the like" (apparently issued by Stove Mounters Union), which he showed to several of his co-employees at Rivers. This activity presumably occurred sometime prior to his discharge on October 2. Mayberry said that although his application for employment at Rivers revealed his former membership in the Stove Mounters Union, Mr. Rivers, who took his application, did not discuss the subject with him, and that at no time did any supervisory personnel ever discuss or mention a union in his presence. There was no evidence that any company representative ever noticed the one or more Stove Mounters' bumper stickers.

3) James Sanders, one of the alleged discriminatees, discharged on October 2, was employed on August 20, 1964. He swept and cleaned up for the first three days he was on the job and then was put to work as a welder. He testified to the following conversation with a night foreman, Lonnie Baker (whose status as a spokesman for the company was disputed):

Q. Did Lonnie Baker ever speak to you about the union?

A. Yes, sir.

* * * * *

Q. And what was said?

A. Well, I talked about the rate of pay for welding; if welding didn't pay better than sweeping, I'd just as soon to have my broom back. At least I wouldn't burn up my clothes. *I said we needed a union around here. He said talking about the union around there, I wouldn't be there very long. I wouldn't have my job very long.* (Emphasis supplied.)

He further testified to a conversation with one Owen Barber, a plant supervisor as follows:

Q. Did Owen Barber speak to you about the union at any time?

A. Yes, sir.

Q. Did you tell us what was said in this conversation?

* * * * *

A. Owen come around where I was working and wanted to know how I was doing and so forth, talking about work, you know; wanted to know how I was getting along. I started complaining about $1.25 an hour for welding and told him *we needed a union around there* so I could get, maybe, better money like some of the others was getting, you know, for welding.

Q. Did Barber make any comment on this to you or say anything about it?

A. I told him that *we needed a union* and he said would I be in favor of anything like that. * * * He asked if I would be in favor of anything like that and *I told him I sure would.* (Emphasis supplied.)

The witness Sanders did not in any way relate these conversations in time or circumstance to the period when union cards were first obtained on September 23 and 24. Both of the above alleged discriminatees affirmed that as far as they knew no one in supervision was aware of the signing of the union cards or any other union activity; and in truth there was no evidence that except for the cards there was any union activity. The trial examiner foreclosed inquiry as to union meetings and the signing of cards by any others besides the alleged discriminatees, and would not allow company counsel to prove by a party not a discriminatee that a card bearing date September 24, 1963, had actually been signed long after October 2 and back dated to that day.

The foregoing is the total material from which the examiner and the Board inferred that the five employees discharged on October 2, 1964, were the victims of a company purpose "to interfere with, restrain or coerce employees in the exercise of the rights, guaranteed in Section 7," Section 8(a) (1) of the Act, 29 U.S.C.A. § 158(a) (1) and to "discourage membership in any labor organization," Section 8(a) (3) of the Act. 29 U.S.C.A. § 158(a) (3). On the basis of what we have set out, the trial examiner said under his heading "C. The Dischargees,"

> "*The October 2 dismissals.* In this setting of *intensive and extensive interference, restraint and coercion,* the Respondent terminated the employment of nine employees between October 2 and December 7, 1964, employees who, as will be noted below, were known by management to be union adherents."
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> * * * * *
>
> "* * * four had signed union cards for Sanders on September 23 or 24. Shelton solicited signatures from others. And Mayberry's interest in being a member

of a labor organization *was plainly well known to management, since he had admitted on his application form, when hired, that he was a member of a union, and while employed always had a union sticker displayed on his car in which he rode to work.*" (Emphasis supplied.)

[2, 3] As to the October 2 discharges, the above inferences were, in our view, impermissible. We have held that the Board and its examiner may, without direct proof, infer illegal and discriminatory conduct by an employer. N. L. R. B. v. Bendix Corp., 299 F.2d 308, 310 (C.A. 6, 1962), cert. den. 371 U.S. 827, 83 S.Ct. 47, 9 L.Ed.2d 65; N. L. R. B. v. Power Equipment Co., 313 F.2d 438, 441 (C.A. 6, 1963); N. L. R. B. v. Murray Ohio Mfg. Co., 326 F.2d 509, 513 (C.A. 6, 1964); N. L. R. B. v. Link-Belt Co., 311 U.S. 584, 596-597, 61 S.Ct. 358, 85 L.Ed. 368, 378 (1941); N. L. R. B. v. Nevada Consolidated Copper Corp., 316 U.S. 105, 107, 62 S.Ct. 960, 86 L.Ed. 1305, 1307 (1942), but a right to *infer* is not a right to *create*. We have the responsibility to inquire whether there is substantial evidence to support the conclusion reached by the examiner and affirmed by the Board, N. L. R. B. v. Murray Ohio Mfg. Co., 326 F.2d 509, 513 (C.A. 6, 1964), even assuming that all of the above outlined testimony provided by the witnesses Mayberry and Sanders is true. That testimony, alone, does not provide sufficient factual background to allow an inference that the company knew that a union campaign was in progress, that the dischargees were active in such campaign, and that the terminations were made to frustrate the campaign and discourage membership in the union. Nor would the examiner's apparent view that the company's assigned reasons for the October discharges were neither valid nor credible provide the needed evidence of discriminatory motivation. See Lawson Milk Co. v. N. L. R. B., 317 F.2d 756, 760 (C.A. 6, 1963).

[4] It was the burden of the General Counsel to prove the allegations of its complaint, to demonstrate that the company's action was motivated, at least in part, by anti-union bias. N. L. R. B. v. Cleveland Trust Co., 214 F.2d 95, 99 (C.A. 6, 1954); Lawson Milk Co. v. N. L. R. B., supra; N. L. R. B. v. Murray Ohio Mfg. Co., supra. That burden has not been carried here. The examiner's statement that,

> "The evidence sustaining General Counsel's allegations that these October 2 discharges were designed to discourage further self organization *is overwhelming.*" (Emphasis supplied.)

is without foundation. We therefore hold that the finding that the October 2 discharges were violative of Sections 8(a) (1) and (3) of the Act is not supported by "substantial evidence on the record as a whole."

This disposition of the matter renders moot petitioner's motion that we remand the case to the Board to hear evidence upon its claim that the October 2 dischargees had not in fact signed union cards on September 23 and 24. The motion was supported by the affidavit of R. T. Rivers that one of the October 2 dischargees (Mayberry) was prepared to testify that the cards purportedly signed on the September dates were in fact backdated after the discharges; it was further supported by an affidavit of another dischargee (Haley) that a representative of the union had arranged for such backdating. Without any investigation of these charges of false swearing, the Board denied the motion primarily upon procedural grounds.

The order of the Board so far as it relates to its finding that the October 2, 1964, discharges were violative of the Act is vacated and denied enforcement; in all other respects its order is enforced.